Supreme Court, U.S.
FILED
JAN 26 1983
Alexander L. Stevas, Clerk

Nos. 82-524, 82-545 and 82-551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

COMMONWEALTH EDISON COMPANY, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

LINDA L. HODGE
Staff Counsel
Atomic Industrial Forum, Inc.
7101 Wisconsin Ave.
Bethesda, Maryland 20814
(301) 654-9260

HAROLD F. REIS
Counsel of Record
DAVID B. RASKIN
LOWENSTEIN, NEWMAN, REIS & AXELRAD, P.C.
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-8400

Attorneys for Amicus Curiae Atomic Industrial Forum, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE ATOMIC INDUSTRIAL FORUM, INC.

This brief is submitted by the Atomic Industrial Forum, Inc. ("Forum")[1] in support of the Petitioners Baltimore Gas and Electric Co., et al. (No. 82-524), Commonwealth Edison Company, et al. (No. 82-551), and the Nuclear Regulatory Commission and United States of America (No. 82-545) on review of the decision of the Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 685 F.2d 459 (D.C. Cir. 1982). Pet. App. 1a-181a.[2]

The Forum is an association of about five hundred fifty domestic and overseas organizations involved in the peaceful uses of nuclear energy. The membership includes electric utilities, manufacturers, architect/engineer/construction firms, service organizations, consultants, uranium producers, radionuclide and radiopharmaceutical suppliers, financial institutions, universities, labor unions, government agencies and research laboratories. Forum members are involved in all phases of construction and operation of nuclear facilities, including each stage of the uranium fuel cycle. One hundred and five of the Forum's 122 domestic electric operating utility members rely on, or plan in the future to rely on, nuclear power generation for at least a portion of their power needs.

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[1] In accordance with Rule 36 of this Court, the Forum has received and filed with the Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding.

[2] Appendices identical as to content and pagination were filed along with the Petitions for Certiorari in both Nos. 82-545 and 82-551. References to the Petitioners' Appendices are cited herein as "Pet. App. ——." This brief does not contain citations to any of the material in the subsequently filed Joint Appendix.

For more than ten years the Nuclear Regulatory Commission ("Commission" or "NRC") and its predecessor agency, the Atomic Energy Commission,[3] have attempted to adopt a generic rule governing the consideration, in individual licensing proceedings affecting light water power reactors, of the environmental effects associated with the uranium fuel cycle. As we demonstrate below, each of the courts which has considered the question has affirmed the legal authority of the Commission to address the matter in generic fashion and each of those courts has recognized the propriety of the agency's effort to avoid repetitious relitigation of identical issues in successive licensing proceedings. Despite the earnest and responsible efforts of the Commission during these last 10 years, however, each of the three fuel cycle rules which it adopted in the course of its evolving approach to the problem has failed to withstand the scrutiny of the Court of Appeals for the District of Columbia Circuit. In consequence, the decisions of that court have adversely affected the interests of the Forum's members by casting a cloud over construction permits and operating licenses issued since the effective date of the original rule on June 6, 1974. In addition, applications now under review by the Nuclear Regulatory Commission and future planning with respect to the choice of nuclear power as a source of electricity are similarly clouded.[4]

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[3] The Atomic Energy Commission's Notice of Proposed Rulemaking, which led to the issuance of the original Table S-3 rule, was published on November 15, 1972. 37 Fed. Reg. 24,191 (1972).

[4] The Court of Appeals decision invalidating the first fuel cycle rule was issued in July of 1976. NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) [the Supreme Court's decision is hereinafter cited as *Vermont Yankee*]. Thereafter, the Commission, on August 13, 1976, suspended the issuance of new construction

The manner in which the Commission has approached the fuel cycle issue during these last ten years has been so reasonable—and increasingly comprehensive—that we believe it fair to assert that there remains no significant question of violation of either the National Environmental Policy Act ("NEPA;" 42 U.S.C. § 4321 (1976)) or the Administrative Procedure Act ("APA;" 5 U.S.C. § 551 (1976)). Yet, the Court of Appeals' decision here under review purports to find such a question. Like that court's 1976 *NRDC* decision, the instant decision represents a significant impediment to the continued private development of nuclear power. The Forum has a deep interest in the removal of unwarranted obstructions to such development so that its members may have the broadest range of energy sources available as each plans for the future energy needs of its service area and the nation. We believe it appropriate for the Supreme Court now to terminate these many years of disruptive litigation.

SUMMARY OF ARGUMENT

In *Vermont Yankee* this Court reversed and remanded the 1976 decision of the Court of Appeals which had invalidated the Nuclear Regulatory Commission's original

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permits and operating licenses. 41 Fed. Reg. 34,707 (1976). However, on October 8, 1976, the Court of Appeals stayed its mandate, on condition that the Commission "shall make any license granted between July 21, 1976 and such time when the mandate is issued subject to the outcome of the proceedings herein." The Commission then directed the resumption of licensing subject to the conditions specified in the stay of mandate. 41 Fed. Reg. 49,898 (1976). In its most recent decision, the Court of Appeals stated that it was expressing no view as to the validity of licenses issued under all three fuel cycle rules. Pet. App. 69a; *see also* Pet. App. 5a n.7. However, on September 1, 1982, it again stayed its mandate and the Commission again directed that any licenses issued in reliance on the fuel cycle rule are to be "conditioned on the final outcome of the judicial proceedings." 47 Fed. Reg. 50,591, 50,593 (1982).

uranium fuel cycle rule. That rule was adopted to govern, in individual licensing proceedings affecting nuclear power reactors, consideration of the environmental impacts of the uranium fuel cycle. In the decision now under review, the Court of Appeals has again invalidated the original fuel cycle rule as well as the subsequently adopted interim and final fuel cycle rules. In so doing, the Court of Appeals violated two explicit directives contained in *Vermont Yankee*.

First, each of the fuel cycle rules adopts a table, to be incorporated into nuclear power plant-specific environmental impact statements, identifying the impacts associated with producing and disposing of the nuclear fuel used in that plant. In each table a zero-release value represents the environmental impact of nuclear waste after its disposal in a geologic repository. This value expresses the Commission's judgment that it is probable that no significant environmental impacts will in fact result from this activity. Since the *Vermont Yankee* decision, the Commission's judgment in this respect has been reinforced by two additional rulemaking proceedings which have now produced a massive and comprehensive record on the impacts of the fuel cycle and in which the Commission has fully recognized and addressed the uncertainties underlying the long-term disposal of nuclear wastes. The rule therefore reflects a policy judgment of the Commission based upon a comprehensive record and a well-reasoned consideration of relevant factors.

In *Vermont Yankee* this Court remanded the case to the Court of Appeals solely to determine whether the fuel cycle rules were based on a record sufficient to meet the minimum requirements of the APA. The Court of Appeals has not suggested that the Commission's inquiry was not sufficiently comprehensive or that the Commission overlooked any relevant information. Nevertheless, the

court held that the Commission may not lawfully employ a zero-value in the portion of the table reflecting the environmental impact of waste disposal in the face of a record which recognizes uncertainty. In the circumstances, the holding below clearly represents the Court's substitution of its own judgment for that of the Commission. That holding violates the explicit injunction of this Court in *Vermont Yankee* that reviewing courts should not interject themselves into the area of discretion of the agency and substitute their own judgment as to the conclusions to be drawn from an agency's consideration of the environmental consequences of its actions.

Second, prior to the decision under review, every court which has considered the question, including this Court in its *Vermont Yankee* decision and even the court below, has recognized that NEPA does not prevent the NRC from eliminating repeated consideration of the environmental impacts of waste disposal in individual licensing proceedings by addressing those impacts in a generic rulemaking proceeding which complies with the minimum requirements of Section 4 of the APA. However, in the decision below the Court of Appeals created a new limitation on the effectiveness of generic rulemaking in the NEPA context. It did so by improperly elevating "uncertainties" relating to waste disposal into environmental "costs" for NEPA purposes and holding that those costs must be balanced in each individual licensing proceeding. This new limitation undermines the holding of this Court in *Vermont Yankee*.

ARGUMENT

I. THE LEGAL AND ADMINISTRATIVE BACKGROUND

Although we are confident that the petitioners' briefs will adequately describe the history of the proceedings now before the Court and the contents of the record, in order to place the argument that follows in context, we think it important to refer briefly to certain aspects of that history.

First, the licensing of a light-water-cooled nuclear power reactor[5] has long been acknowledged to constitute "major Federal action significantly affecting the quality of the human environment" within the meaning of Section 102 (2) (C) of NEPA, 42 U.S.C. § 4332(2) (C), requiring the preparation, by the NRC, of a statement addressing the environmental impacts of nuclear reactor construction and operation. The purpose of the Commission's fuel cycle rule, 10 C.F.R. § 51.20(e) (1982), and of Table S-3 which it incorporates, is to provide a basis for evaluating, in Commission proceedings for licensing an individual nuclear power reactor, the environmental effects attributable to one aspect of nuclear reactor operation—the production and disposal of the uranium fuel to be used in that reactor. These activities include "uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials and management of low level wastes and high level wastes. . . ." 10 C.F.R. § 51.20(e) (1982). However, the essential dispute in the courts has always related only to the "back end" of the fuel cycle, i.e., to waste disposal or waste management. These activities occur apart from the operation of the reactor, and their environmental impacts do not differ significantly from reactor to reactor.

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[5] Almost all of this nation's operating and currently projected nuclear power reactors are light-water-cooled.

Second, each of the courts which has addressed the subject has strongly endorsed the Commission's view that, in connection with nuclear plant licensing, generic treatment of the fuel cycle issue is particularly appropriate. In its 1976 *NRDC v. NRC* decision, the District of Columbia Circuit expressly stated that "[n]o one questions" the agency's power to deal with fuel cycle issues by rulemaking. 547 F.2d at 641 n.17. In *Vermont Yankee* this Court noted that statement, adding: "Neither does anyone seriously question before this Court the Commission's authority in this respect." 435 U.S. at 535 n.13. *See also Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

Consequently, the last time this case was before this Court, there was agreement between this Court and the Court of Appeals that generic rulemaking is an appropriate instrument for approaching the fuel cycle problem. The difference between the courts essentially involved the question whether the Court of Appeals could—in this NEPA context—require the Commission to utilize rulemaking procedures beyond those imposed by Section 4 of the APA, 5 U.S.C. § 553 (1976). The Court of Appeals appeared to conceive its review function as authorizing it to decide, not simply whether the requirements of NEPA and the APA had been met, but also "whether the procedures provided by the agency were sufficient to ventilate the issues." 547 F.2d at 643. The Court of Appeals concluded that the procedures, so measured, were inadequate. *See* 435 U.S. at 541.

To a large extent this conclusion derived from the Court of Appeals' perception in 1976 that the agency had failed to confront, explore and assess the uncertainties involved in waste management. 547 F.2d at 653. The court suggested that if "procedures to accomplish the innovative task of implementing NEPA through rulemak-

ing" could be devised at all, the problem might be resolved by procedures additional to those prescribed in Section 4 of the APA, such as "document discovery, interrogatories, . . . limited cross-examination, funding independent research by intervenors," etc., or even through use of "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner. . . ." *Id.* at 653-54.

That view was unanimously rejected by this Court, which held that, in the absence of "constitutional constraints" or extremely compelling circumstances not here presented, 435 U.S. at 543, administrative agencies engaged in rulemaking are free to fashion their own procedures so long as those procedures comply with Section 4 of the APA. *Id.* at 543-48. It also held that NEPA does not prescribe additions to those procedures, does not repeal any other statute by implication and does not create procedural requirements other than those imposed by its "plain language." *Id.* at 548 (citing *Aberdeen & Rockfish R. R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975); *United States v. SCRAP*, 412 U.S. 669, 694 (1973); and *Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976)). This Court emphatically declared that the decision-making functions under NEPA are to be exercised by the agencies required to administer it, and their decisions are not to be set aside "because the court is unhappy with the result reached." 435 U.S. at 558. Later, this view was reaffirmed in *Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-29 (1980).[6]

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[6] There, the Court reaffirmed the statement in Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), that a reviewing court cannot "interject itself within the area of discretion of the executive as to the choice of action to be taken." We read Mr. Justice Marshall's dissent in Stryckers Bay as also subscribing to this principle. *See* 444 U.S. at 229.

Third, the Table S-3 rules are now the result of three separate rulemaking proceedings undertaken over an approximately 10-year period and still ongoing.[7] They are firmly supported by an extensive record. In connection with the first of these rulemaking proceedings, the NRC technical staff analyzed the impacts of the entire fuel cycle and prepared a detailed report which, in conjunction with a record produced at two days of hearings, formed the basis for the values in the original rule.[8] In support of the interim rule (the second rulemaking proceeding), the Commission directed the staff to undertake an additional analysis of the impacts of the back-end of the fuel-cycle, and this analysis was published in another lengthy report.[9] The Commission also solicited and received public comments on both its original and interim rulemaking proposals, and prior to issuing the interim rule, prepared a 400-page catalogue and analysis of the public comments.[10] The Commission's third rulemaking proceeding incorporated an even wider variety of fact-finding de-

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[7] Atomic Energy Commission, Environmental Effects of the Uranium Fuel Cycle, 39 Fed. Reg. 14,188 (1974) (*Original Rule*) (Pet. App. 224a); Uranium Fuel Cycle Impact from Spent Fuel Reprocessing and Radioactive Waste Management; Effective Interim Rule, 42 Fed. Reg. 13,803 (1977) (*Interim Rule*) (Pet. App. 240a); Uranium Fuel Cycle Impact from Spent Fuel Reprocessing and Radioactive Waste Management; 44 Fed. Reg. 45,362 (1979) (*Final Rule*) (Pet. App. 341a).

[8] *Environmental Survey of the Uranium Fuel Cycle*, WASH-1248 (April 1974).

[9] *Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle*, NUREG-0116 (October 1976).

[10] *Public Comments and Task Force Response Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle, NUREG-0116*, NUREG-0126 (March 1977).

vices. Prior to promulgating the final rule the Commission held a quasi-adjudicatory proceeding before a board designated to hear testimony and produce a record on fuel cycle impacts. The NRC taff and numerous other parties representing diverse interests participated in the hearing by submitting direct testimony, presenting oral statements, filing questions addressed to other parties, and submitting rebuttal testimony. On the basis of the extensive record which had been developed, the board issued two lengthy reports addressing the factual and policy issues posed by the evidence and setting forth its conclusions.[11] The Commission also took written statements and heard oral arguments from participants in the hearing.

In sum, the record underlying the Commission's analysis of the impacts of the fuel cycle is now massive, numbering thousands of pages, and that record incorporates the views not only of the Commission technical staff but of outside parties and an independent board. In addition, as discussed below, the Commission itself considered the factual record before promulgating each of the three rules and each time issued a statement setting forth its analysis and conclusions based on the record.[12] Moreover, the Commission made clear, in its statement supporting the final rule, that its investigation is still ongoing. The Commission has issued a proposed explanatory narrative to be incorporated into individual impact statements along with the Table,[13] and it has acknowledged that it must undertake further investigation of fuel cycle im-

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[11] Report of the Hearing Board to the NRC Regarding Environmental Effects of the Uranium Fuel Cycle (August 31, 1978); Conclusions and Recommendations of the Hearing Board Regarding the Environmental Effects of the Uranium Fuel Cycle (October 26, 1978). Pet. App. 274a.

[12] *See supra* note 7.

[13] 46 Fed. Reg. 15,154 (1981).

pacts as more information becomes available. Pet. App. 344a, 368a.

This is the record that must be assessed against two legal principles which this Court enunciated in its 1978 *Vermont Yankee* decision. First, it is the Commission, not the courts, which must make the ultimate policy decision, and the court may not overrule the agency decision merely because of disagreements as to the result reached. Second, the NRC may, consistent with both the APA and NEPA, address the environmental impacts of waste management and disposal through the use of a generic rule governing the matter; the Commission need not repeatedly litigate the problem in separate licensing proceedings.

Like the decision of the 1976 majority in the Court of Appeals, it is not easy to determine the exact basis for the majority opinion below. 435 U.S. at 539. In our view, however, the majority opinion can be interpreted both as a rejection of the Commision's policy judgment as to the decisional weight to be accorded to the uncertainties concerning waste disposal in individual licensing proceedings and as holding that NEPA limits the effectiveness of generic rulemaking which otherwise meets the requirements of the APA. Under either reading, each of which we address below, the Court of Appeals' majority has failed to comply with the instructions of this Court.[14]

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[14] An additional ground for invalidation of the original and interim rules expressed by the majority below is "because they fail to allow for proper consideration of the health, socioeconomic and cumulative effects of fuel-cycle activities." Pet. App. 11a-12a; *see also* Pet. App. 52a-60a, 69a. This ground for invalidation does not relate to the final rule or the interim rule following its amendment, Pet. App. 60a, 69a, and is, we believe, essentially an "add-on", or secondary, basis for the decision, which will be adequately addressed in the briefs of the Petitioners. *See, e.g.*, the Petitions for Certiorari in No. 82-524, at pp. 23-24; No. 82-545, at pp. 18-21; and No. 82-551, at pp. 25-27. Consequently, we do not address that ground here.

II. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS POLICY JUDGMENT FOR THAT OF THE NRC CONCERNING THE DECISIONAL WEIGHT TO BE ACCORDED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT TO THE UNCERTAINTIES RELATING TO WASTE DISPOSAL IN INDIVIDUAL NUCLEAR REACTOR LICENSING PROCEEDINGS

We submit that the majority opinion below essentially represents a rejection of the Commission's judgment that a zero-release value is appropriate for inclusion in that portion of Table S-3 representing the environmental impact of nuclear waste disposal in a geologic repository. As such, it is no more than "a disagreement with reasoned policy decisions by the Commission." [15] It is important to this conclusion to make clear that the majority opinion does not represent an attempt to do what the Supreme Court told the Court of Appeals to do in *Vermont Yankee*. There, this Court remanded for one purpose only.

> There remains, of course, the question of whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court. Judge Tamm, concurring in the result reached by the majority of the Court of Appeals, thought that it did not. There are also intimations in the majority opinion which suggest that the judges who joined it likewise may have thought the administrative proceedings an insufficient basis upon which to predicate the rule in question. We accordingly remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides.

435 U.S. at 549.[16]

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[15] Dissenting Opinion, Pet. App. 162a n.134; *see also* Pet. App. 164a.

[16] Judge Tamm's concurring opinion, referenced by the Court, had stated that

[Footnote continued on page 14]

The review provided above of the extensive record made by the Commission before and after *Vermont Yankee* leaves no doubt that it has now taken the "hard look" at environmental consequences which NEPA requires, *Kleppe v. Sierra Club*, 427 U.S. at 410 n.21. Unlike the Court of Appeals' 1976 opinions, the instant majority opinion contains no expression of dissatisfaction with the breadth or depth of the Commission's investigation into the environmental effects of the nuclear fuel cycle. In fact, it took the majority below nearly 15 pages to review the lengthy record produced by the Commission, and that review does not point to any relevant information that the Commission failed to consider in this investigation. Pet. App. 13a-28a.

That the majority did not criticize the Commission on these grounds underscores the fact that its opinion represents no more than a disagreement with the judgment that the Commission made after it had taken the required "hard look." We demonstrate below, however, that, in view of the record and the Commission's clearly articulated rationale, its judgment was most certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976).

At the outset, the Commission's judgment regarding the treatment of uncertainty in the table should be assessed in the context of its determination that environmental

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[16] [Continued]

> the *inadequacy of the record* demands that [the court] remand this case to the Commission in order to ensure that it has taken a hard look at the waste storage issue.

NRDC v. NRC, 547 F.2d at 658 (Tamm, J., concurring; emphasis added.) And in his opinion for the Court in Minnesota v. NRC, 602 F.2d at 418, the late Judge Leventhal interpreted this Court's instructions in *Vermont Yankee* "to permit a determination whether the administrative record contained sufficient evidence to support the NRC's findings."

effects related to the overall fuel cycle will have small, or "relatively insignificant," [17] impacts on individual plant licensing decisions, and that determination has not varied substantially as between the original, the interim and the final fuel cycle rules. Pet. App. 342a, 349a, 355a n.10.[18] This has remained so even after more than a decade of examination and reexamination as additional information has become available.[19] The Commission did not, however, use this determination as a basis for avoiding consideration of the uncertainties affecting the waste disposal aspects of the fuel cycle. In the statement accompanying the final rule, the Commission expressly acknowledged uncertainties in this area and, in light of them, made several policy judgments regarding the appropriate method of incorporating waste disposal impacts into the rule. Pet. App. 345a-46a.

First, it concluded that fuel cycle impacts should be reflected in the rule conservatively:

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[17] This is one reason for not distinguishing among the rules as to their validity. In addition, in *Vermont Yankee*, this Court indicated that on remand, the Court of Appeals would have discretion to consider "any additions made to the record . . .", 435 U.S. at 535 n.14, and neither the majority nor the dissent below made any distinction concerning the record support for any of the rules.

[18] Recently, the Commission issued a proposed narrative explanation of Table S-3 in which it again expressed the view that the environmental impacts addressed in the table "cannot significantly affect the environmental cost-benefit balance for a light water reactor." 46 Fed. Reg. 15,154, 15,155 (1981).

[19] *See* Pet. App. 138a-139a n.60. Quite erroneously, the majority concludes that "[t]he Commission does not argue that the environmental impact of fuel-cycle activities is insignificant, nor does it appear that such an argument could legitimately be made." Pet. App. 32a n.93. It cites a 1974 opinion of the NRC's Appeal Board in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 87 (1974). Not only does the majority ignore the Commission's express conclusions to the contrary, but also the Appeal Board's subsequent (1977) recognition that the "effects assigned by the interim rule to the uranium fuel cycle are . . . extremely small." Pet. App. 355a n.10.

> A reasonable approach for determining waste disposal impacts is to focus on a system which seems likely to be deployed and to estimate its impacts conservatively, based on the best available information and analysis.

Pet. App. 346a. In fact, the Commission placed its zero-release judgment in the particular context of the Table's overall conservatism:

> Given the staff's assumption that volatile fission products are totally released before the repository is sealed, the Commission finds that taking post-sealing releases as zero does not significantly reduce the over-all conservatism of the table.

Pet. App. 370a.

Second, the Commission concluded that the generic, rather than the project-specific, nature of fuel cycle impacts, and the difficulties associated with their analysis, dictated that they should be considered, where possible, by the Commission rather than by boards in individual licensing proceedings:

> A study of fuel cycle impact thus involves difficult generic analysis and prediction well outside the normal scope of facility-specific subjects dealt with by a reactor licensing board. This does not mean that the subject can be ignored or deferred until the fuel cycle facilities themselves come up for licensing. It does mean that in reactor licensing fuel cycle impacts should be treated where possible by generic rulemaking rather than case-by-case adjudication.

Pet. App. 346a (footnote omitted).

Third, the Commission concluded that the numerical values contained in the Table should be supplemented by an "explanatory narrative" discussing the environmental significance of those values. Until the narrative is completed, the Staff was directed to prepare a statement clarifying the meaning of the figures in the Table for inclusion in individual licensing actions. Pet App. 376a-77a.

Finally, and in light of the considerations discussed above, the Commission expressly addressed the question whether:

> In view of the uncertainties noted regarding waste disposal . . . these uncertainties can or should be reflected explicitly in the fuel cycle rule. The Commission has concluded that the rule should not be so modified. On the individual reactor licensing level, where the proceedings deal with fuel cycle issues only peripherally, the Commission sees no advantage in having licensing boards repeatedly weigh for themselves the effect of uncertainties on the selection of fuel cycle impacts for use in cost-benefit balancing. This is a generic question properly dealt with in this rulemaking as part of choosing what impact values should go into the fuel cycle rule. The Commission concludes, having noted that uncertainties exist, that for the limited purpose of the fuel cycle rule it is reasonable to base impacts on the assumption which the Commission believes the probabilities favor, *i.e.* that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere.

Pet. App. 368a-69a.[20]

This record makes clear that Table S-3 reflects a policy judgment by the Commission that the uncertainty con-

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[20] We would note that since the decision below, there have been two significant steps which are consistent with the assumption which the Commission made. First, legislation has been enacted "to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste . . ." Nuclear Waste Policy Act of 1982, Pub. L. 97-425, § 111(b)(1), 96 Stat. 2201 (1982). In addition, the Environmental Protection Agency published, in December, proposed regulations setting forth the environmental standards related to the management and disposal of high-level transuranic radioactive wastes in repositories. 47 *Fed. Reg.* 58196 (December 29, 1982). Based on "engineering controls that [EPA] believe[s] are readily achievable" these standards would entail "health risks over 10,000 years . . . no greater than the risks from an equivalent amount of unmined uranium ore." *Id.* at 58199.

cerning waste disposal is generic in nature and should not affect the NEPA environmental assessment in individual licensing proceedings. The "Commission chose as a matter of policy not only to acknowledge that uncertainty, but to accept it, and then to proceed in the face of that uncertainty." Pet App. 143a-44a (footnote omitted). The Commission's explanation of why it decided that uncertainties affecting waste disposal should not affect the NEPA assessment in individual cases shows that its decision was "fully informed and well-considered." *Vermont Yankee*, 435 U.S. at 558; *Strycker's Bay*, 444 U.S. at 227. Its decision was based "on a consideration of the relevant factors" and there was no "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The values in the table were, as the minority opinion below recognized, intended as "qualitative risk assessments, . . . validly based on agency expertise and the best available information, with underlying uncertainties and assumptions fully exposed. . . ." Pet. App. 137a. Consequently, the Commission's decision should have been accorded the "deference" normally extended to agency policy decisions, *Id.*, and should not have been held "arbitrary and capricious" within the meaning of the APA. 5 U.S.C. § 706(2)(A).

Yet, the majority below did so hold. It ruled that, no matter what the Commission's rationale for the use of a Table of numerical values, the Commission could not, on the basis of a record which reflects "uncertainty," lawfully conclude that the appropriate value for long-term waste disposal was zero.

> To the extent that the Commission is arguing that the uncertainties can be assessed generically, and that the attendant risks can be measured generically, we agree. As we have stated above, however, *the Commission cannot find the environmental cost represented by the uncertainties to be zero unless their cost is, in fact, zero.*

Pet. App. 47a (emphasis added).

This is a novel and inflexible analytical treatment of "uncertainty" under NEPA, and prior decisions of the District of Columbia Circuit cut entirely against it. In the past, the Circuit has recognized that agency discretion is greater where the agency is required to delve into new and uncertain areas of technical or scientific knowledge. *NRDC v. EPA*, 655 F.2d 318, 329 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1017; *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474 n.18 (D.C. Cir. 1974); *see also Amoco Oil Co. v. EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974). Other courts have also recognized that the environmental and other values which must be weighed under NEPA are often not susceptible to quantification and for that reason hold that NEPA may be satisfied by a flexible balancing of environmental and other factors. *Robinson v. Knebel*, 550 F.2d 422, 426 (8th Cir. 1977); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

Moreover, the insistence on the inclusion of uncertainty as a "cost" in a cost-benefit "ledger" to be calculated in each licensing proceeding prevents the Commission from exercising its discretion as to the manner in which a particular class of environmental impacts shall be factored into decisions on individual licensing applications. The Commission had concluded that, on the basis of the overall record and the conservative assumptions underlying the values in the table, licensing boards may not accord decisional weight to the uncertainties affecting waste disposal in individual proceedings. The majority simply decreed otherwise—that those uncertainties must be considered "in a manner that would allow licensing decisions to be affected." Pet. App. 46a.[21] In so doing, it improp-

[21] There are intimations in the majority opinion that if the Commission had ascribed to waste disposal an environmental impact reflecting "upper bounds" of environmental risks, Pet. App. 51a-52a, i.e., assumed for all cases the worst possible environmental consequences, the majority might have upheld the rule. We view this as simply another way of saying that the majority had a

erly substituted its judgment for that of the Commission on this matter. *Kleppe*, 427 U.S. at 410 n.21.

This Court has made clear that with respect to agency decisions under NEPA, "the only role for the reviewing court is to ensure that the agency has considered the environmental consequences" of its actions. *Strycker's Bay*, 444 U.S. at 227. The majority below far exceeded its authority in this case by "interject[ing] itself within the area of discretion of the executive", *Kleppe*, 427 U.S. at 410 n.21, and imposing on the Commission the "decision the judges of the Court of Appeals . . . would have reached had they been members of the decision-making unit of the agency." *Vermont Yankee*, 435 U.S. at 558. In sum, for a second time the majority below invalidated the fuel cycle rules because it was "unhappy with the result reached." *Id.*

III. THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE NATIONAL ENVIRONMENTAL POLICY ACT AS LIMITING THE EFFECTIVENESS OF GENERIC RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

It is also possible to interpret the majority opinion below as "procedural" in nature in that it imposes limitations on the effectiveness of a generic rule when applied in individual licensing proceedings. So interpreted, the opinion also fails to comply with *Vermont Yankee*, where the Court pointedly noted that the Commission's authority to address the environmental impacts of the fuel cycle in a manner which does not require repeated, further consideration in individual adjudications was unquestioned. 435 U.S. at 535 n.13.

The Commission's treatment of uncertainties as to the ultimate availability and integrity of waste disposal was central to the earlier round of litigation. *See supra* page 8. At that time, the Court of Appeals commended the

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substantive disagreement with the Commission as to the environmental risks involved.

Commission on the "adequate and even admirable job of describing the processes involved" in other phases of the fuel cycle, and it set aside only the portions of the rule pertaining to the waste disposal issue. 547 F.2d at 647, 655. It was only with respect to the uncertainties affecting such matters that the court sought to prescribe "more sensitive" procedures. Clearly, therefore, when this Court reversed and remanded for reconsideration of "the rule as the Administrative Procedure Act provides," 435 U.S. at 540, it intended the normal consequences of that direction to follow: the Commission's decision concerning the uncertainties affecting waste disposal could be reached in a generic rulemaking proceeding; the agency's decision would be judicially reviewed to determine only whether the agency had complied with the minimum requirements of Section 4 of the APA and whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); and, if those standards were met, the already recognized uncertainties would *not* have to be litigated further in individual licensing proceedings. Thus, as Judge Wilkey stated in his dissent, this Court had charted "a clearly presented path" for the Court of Appeals to follow on remand. Pet. App. 135a.

Prior to the issuance of the opinion below, a different panel of that court unambiguously set forth this understanding of the Supreme Court's directions. Judge Leventhal's opinion in *Minnesota v. NRC*, states:

> We agree with the Commission's position that it could properly consider the complex issue of nuclear waste disposal in a "generic" proceeding such as rulemaking, and then apply its determinations in subsequent adjudicatory proceedings. Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the questions rather than relitigating the question in each proceeding in which it is raised. . . .
>
> Petitioners fear that determination of the question in a "generic" proceeding, which would proceed as a

> rulemaking rather than adjudication, will deprive them of procedures, such as cross examination, to test the evidence underlying the probability determination that would be afforded by an adjudication. We do not dictate the procedures of the "generic" proceeding. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the determination may be a kind of legislative judgment for which rulemaking would suffice.

602 F.2d at 416-17.

We have demonstrated in Part II above that had the Court of Appeals reviewed the fuel cycle rules "as the Administrative Procedure Act requires," the rules would have been upheld and that would have been the end of the matter. Instead, it was only the beginning; for without expressly taking issue with either this Court's direction in *Vermont Yankee* or the straightforward recognition of that direction in *Minnesota v. NRC*, the majority below found a new reason why a regulation implementing NEPA, and adopted in full conformance with Section 4 of the APA, should not be given its intended effect. Specifically, the Court of Appeals held that the uncertainties relating to waste disposal may not be dispositively addressed by regulation adopted in compliance with Section 4.[22]

To be sure, the majority gave lip service to the proposition that: "In general, an agency in the position of the Commission is free to implement NEPA through generic rulemaking. . . ." However, that acknowledgment was immediately qualified by requiring that any generic

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[22] The Court of Appeals' decision could be read to permit dispositive consideration of this issue by generic rule only if the Commission were to base the values in the table on the assumption of the worst possible environmental consequences. So interpreted, the decision represents a substitution of the court's judgment for that of the agency. *See supra* note 21.

rule must adequately address the complexities perceived by the majority to exist with respect to balancing "generic costs and benefits" in individual licensing decisions. Pet. App. 43a-44a. First elevating the uncertainties related to waste disposal to the level of "environmental costs," Pet. App. 46a,[23] the majority then held that such "costs" cannot "be excluded entirely from the balancing process that must precede an agency's decision to take a major action," Pet. App. 47a-48a, i.e., such "costs" cannot be excluded entirely from individual licensing proceedings. The necessary consequence of this rationale is that uncertainties relating to waste disposal methods must —even though they have been addressed generically in a rulemaking proceeding—also be considered in each licensing. Indeed, the majority states that:

> The process that began with the proposal of the Table S-3 Rule does not allow the uncertainties concerning permanent storage to play a role *in the ultimate licensing decision*. That omission, and hence, the Rule, which causes it, constitutes a blatant violation of NEPA.

Pet. App. 46a (emphasis added). *See also* Pet. App. 49a-50a n.137.

Since, under Commission procedure, "the ultimate licensing decision" is always an adjudication, the majority has held that, whatever authority the NRC might have "[i]n general" or "[i]n the abstract," Pet. App. 43a-44a, to implement NEPA through generic rulemaking, the ultimate ruling on the environmental impacts of waste disposal—and by implication of any other environmental impacts—must be reserved for the licensing board in individual proceedings. This conclusion is reinforced by Judge Bazelon's subsequent statement as to why he voted to deny rehearing. He reiterated, at that time, the position that under NEPA environmental issues have to be

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[23] *See also* Pet. App. 37a: "Regardless of the source environmental risks are environmental costs that must be factored into the NEPA calculus."

considered at every stage of agency consideration of "a particular action," and cannot be excluded "entirely from consideration when the decision is being made to go forward with the project." Pet. App. 187a.[24]

Therefore, despite the obvious intent of this Court when it directed the Court of Appeals to reconsider the fuel cycle rule "as the Administrative Procedure Act provides," pp. 20-21, *supra*, that court has contrived a new limitation on generic rulemaking in the NEPA context, the existence of which was not even hinted at the first time it reviewed the fuel cycle rule. By so limiting the impact of generic rulemaking, the decision below flies in the face of what has been said previously by every court which has dealt with the issue, and thereby again reads into NEPA procedural requirements beyond "those stated in the plain language of the Act." *Vermont Yankee*, 435 U.S. at 548; *Kleppe*, 427 U.S. at 405-06.[25]

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[24] Both the majority opinion, Pet. App. 46a n.125, and Judge Bazelon's explanatory statement, Pet. App. 187a, rely upon Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971) for the quoted propositions. We do not read Calvert Cliffs as precluding environmental judgments validly made in a rulemaking from being incorporated into individual licensing decisions; and the fuel cycle rules at issue here do no more than that. If Calvert Cliffs is read more expansively, it would impose procedural limitations in addition to those contained in NEPA's "plain language" and was, to that extent, implicitly overruled by this Court's decision in Vermont Yankee, 435 U.S. at 548; *see also* Aberdeen & Rockfish R. R. Co. v. SCRAP, 422 U.S. at 321 n.20.

[25] Whether or not intended, if left standing, the decision below could bring about a result which the Court of Appeals majority was invalidly trying to effect in 1976. At that time, the majority faulted the Commission for not going beyond the requirements of Section 4 of the APA and employing procedures such as document discovery, interrogatories and cross-examination in the original fuel cycle rulemaking proceeding. All of those standard instruments of adjudication are in fact available in NRC licensing proceedings. *See* 10 CFR Part 2, Subpart G. If the waste disposal issue is going to be considered in each individual reactor licensing proceeding, as the majority below would now require, those procedures would presumably be available and this Court's decision in Vermont Yankee would be effectively nullified.

CONCLUSION

For the reasons set forth above, we submit that the decision of the Court of Appeals, invalidating each of the successive fuel cycle rules, was erroneous and contravened this Court's holding in *Vermont Yankee*. We therefore request that this Court reverse the decision below.

We further suggest that the reversal should not result merely in another remand to the Court of Appeals. *See Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966). With all deference, the history of this prolonged litigation suggests that further consideration by the Court of Appeals creates too great a risk of yet a third "innovative" decision invalidating the fuel cycle rules. In the words of the dissenting judge below, the majority has created "an impossible task of predicting this court's response . . .," Pet. App. 174a, to the NRC's efforts to comply with NEPA. Moreover, we believe the cumulative record before this Court is clearly adequate for it to conclude that the Commission's actions in adopting each of the fuel cycle rules meets the standards governing review. The Commission's actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); and it took the "hard look" at environmental concerns that NEPA requires. *Kleppe*, 427 U.S. at 410 n.21. Only a reversal upholding the validity of each of the fuel cycle rules will assure that this protracted litigation will be terminated, the cloud over past and future nuclear licenses dissipated and an unwarranted burden on the development of nuclear power removed.

Respectfully submitted,

LINDA L. HODGE
Staff Counsel
Atomic Industrial Forum, Inc.
7101 Wisconsin Ave.
Bethesda, Maryland 20814
(301) 654-9260

HAROLD F. REIS
Counsel of Record
DAVID B. RASKIN
LOWENSTEIN, NEWMAN, REIS & AXELRAD, P.C.
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-8400

Attorneys for Amicus Curiae
Atomic Industrial Forum, Inc.